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Supreme Court, U.S.
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No. 93-1978

In The

Supreme Court of the United States

October Term, 1994

LIBERTY LAKE INVESTMENTS, INC.,

Petitioner,

vs.

HARRY F. MAGNUSON, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

ROBERT B. HENDERSON
HENDERSON AND KELLMAN, P.C.
1017 Washington Mutual Building
Spokane, WA 99201
(509) 623-2900

Counsel for Respondents Barnes and McCarthy Management, Inc.

LESLIE R. WEATHERHEAD*
WITHERSPOON, KELLEY, DAVENPORT & TOOLE
1100 U.S. Bank Building
Spokane, WA 99201
(509) 624-5265

Counsel for Respondents Magnuson, Plese and University City, Inc.

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

I. RULE 29.1 STATEMENT.

Respondents University City, Inc. and McCarthy Management and Development Co., Inc. are closely held, non-public Washington corporations. Neither corporation has any parent, and neither has any subsidiaries other than wholly-owned subsidiaries. As of June 1993, McCarthy Management and Development Co., Inc. was renamed Barnes Management and Development Inc. The ownership of the corporation was not changed.

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I. STATEMENT OF THE CASE.

A. Proceedings Below.

Petitioner filed this case in the United States District Court for the Eastern District of Washington on December 29, 1989.[1] A year and a half later, on June 12, 1991, Respondents moved for summary judgment. The motion for summary judgment was argued over a full day on December 20, 1991 on a record consisting of nearly two thousand pages of affidavits, exhibits and briefs.

The District Court granted summary judgment. The District Court held there was no genuine issue of material fact (1) that Petitioner lacked antitrust standing[2] because Respondents had not caused any loss allegedly suffered by Petitioner and because Petitioner was not competitor or consumer in any market in which Respondents do business, and (2) that the Respondents' efforts to convince the county to change its mind about permitting a shopping mall (and the ensuing lawsuit) were privileged.[3]

Petitioner appealed, and the Court of Appeals reviewed the order for summary judgment *de novo*.[4] The Court of Appeals affirmed. Its decision turned solely on

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[1] An identical complaint was filed in State Court (where it is still pending) the same day.

[2] The District Court applied the standing test of *Associated General Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983), *See* Appendix to Petition for Writ of Certiorari (hereafter "Pet. App."), 19b.

[3] *See* Pet. App. B.

[4] *See* Pet. App. 4a.

the issue of privilege, which it found dispositive, obviating any need to address standing. Rehearing was denied, and the Petition to this Court ensued.

B. Facts.

1. Introduction.

Consonant with their clear duty to keep this brief "as short as possible,"[5] Respondents do not here set out the entire record of events leading to this lawsuit. Rather, Respondents here summarize for the Court, solely to avoid any possibility of waiver,[6] the critical facts as to which, the district and appellate courts held, Petitioners failed to produce evidence sufficient to create a genuine issue of material fact (the bare assertions in the Petition notwithstanding).

2. Respondents Did Not Cause Petitioner Harm.

Petitioner is a landowner. It wished to sell some of its land to the Cafaro Co., a shopping mall developer. The undisputed evidence was (as the district court found[7]) that Petitioner's alleged loss flowed from the failure by

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[5] Sup. Ct. R. 15.4.

[6] Sup. Ct. R. 15.1: " . . . [T]he brief in opposition should address any perceived misstatements of fact . . . . Counsel are admonished that they have an obligation to point out any perceived misstatements in the brief in opposition, and not later."

[7] Pet. App. 21b-23b.

the Cafaro Co. (which was not a party to the lawsuit) to perform a contract to buy a piece of land from Petitioner. It was undisputed that the Cafaro Co. decided against buying the property (where it had considered building a shopping mall) *not* because Respondents aided an unsuccessful challenge to the zoning decision which permitted a mall, but because market factors militated against building a mall there. The Cafaro Co. considered the costs too high,[8] and demand by retail tenants too weak,[9] to allow for a successful mall project.

3. There Was No "Antitrust Injury".

The district court also held it was undisputed that Petitioner's alleged loss flowed from a frustrated contract, not from any injury to competition. In other words, the undisputed facts were that Petitioner was not a consumer or competitor in any relevant market with Respondents, and any injury was not "antitrust injury."[10]

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[8] The local officials conditioned issuance of permits on prior agreement with the Washington State Department of Transportation for freeway improvements necessary to provide traffic access. The State insisted that the mall proponent pay 41% of the costs of the freeway work. "If we have to pay 41% . . . " Cafaro wrote, "this deal is dead." Pet. App. 9b.

[9] Cafaro Co. said that lack of "anchor tenants" (large retail concerns) was the key problem, Pet. App. 9b-11b. Cafaro Co. stated that if the necessary retail tenants could be found, it would start construction in spite of the zoning challenge. Pet. App. 12b.

[10] Pet. App. 22b.

4. There Were No "Straw Parties" To The Zoning Challenge And No Misconduct Before Any Tribunal.

A Spokane County zoning official approved an application to permit the construction of a one million square foot shopping mall on Petitioner's land. Darlene Compton, the Pleses and Larry Lyden (through his corporation, West 514, Inc.) urged the Spokane Board of County Commissioners to reverse that decision. When the Board of Commissioners refused, Compton, the Pleses, and Lyden filed a lawsuit (as authorized by state statute) for a writ of review. The suit was called *West 514, Inc., et al. v. Spokane County, et al.* The suit alleged the Spokane County Board of Commissioners had not adequately considered the objections that the proposed mall project would (1) cause deterioration of Spokane's downtown, and (2) cause harm to Spokane's sole source aquifer, over which it was proposed to be built.

The state superior court first reversed the Board of Commissioners' finding that the objecting parties lacked standing, and issued a writ of review. After plenary review, the superior court sustained the Board of Commissioners' decision to approve the project, in an unpublished order. The State Court of Appeals affirmed, in a published opinion.[11] All three of these opinions are set out in the Appendix hereto.

Compton, the Pleses, and Lyden had a strong personal interest in convincing the county government to

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[11] 53 Wn.App. 838, 770 P.2d 1065, *rev. denied*, 113 Wn.2d 1005, 777 P.2d 1050 (1989).

change its mind about permitting the mall project. It was undisputed that their petitions to the Spokane County Board of Commissioners, and, later, to the state court, were animated by concern about the effects of the proposed mall on the aquifer and on downtown Spokane, and by a strong desire to convince the county to preserve the *status quo.*[12]

By her own account,[13] Darlene Compton was deeply and increasingly concerned about the environmental implications of the proposed mall project. Orville Barnes told her of his opinion that the proposed mall would be harmful to downtown Spokane. This was Barnes' actual opinion,[14] not a "misstatement." Compton was also very worried about threats to water quality in the Spokane-Rathdrum aquifer. Though Compton later became torn between her environmental concerns and a desire to avoid the publicity engendered by the lawsuit which was later filed, it is undisputed that she actively participated in a hearing before the County Board of Commissioners and affirmatively decided to participate as a plaintiff in

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[12] Pet. App. 10a-11a. Although the Pleses had an economic interest in University City, Petitioner conceded before the state court that they were not for that reason disqualified from raising environmental objections.

[13] Darlene Compton was originally a defendant below. She was dismissed from the suit after furnishing the defendants with a sworn statement detailing her knowledge of events. It was to this statement that the Court of Appeals referred. Pet. App. 10a-11a.

[14] Barnes so testified before the Board of Commissioners. Later, one local newspaper independently weighed in with articles about the damage Cafaro Co. mall projects had done to downtowns in other cities.

the *West 514, Inc.* lawsuit. She did have discussions with her lawyers about whether to stay in the lawsuit, but it is undisputed that any instructions she gave to discontinue her involvement in the lawsuit came almost a year after May 13, 1987, the date upon which it is undisputed that, in Petitioner's words, the "window of opportunity" for the proposed mall closed.[15] It is also undisputed that the other plaintiffs in the *West 514, Inc.* case desired to change the county's decision, to forestall harm to the aquifer and to downtown Spokane's physical environment.

There were no settlement proposals from any party at any time, and therefore no improper failure to communicate settlement offers.[16] There was no evidence that the suit was "controlled" by third parties[17] nor that any false statement of any kind was ever made to any tribunal, nor that counsel for plaintiffs in *West 514, Inc.* did other than to ethically and zealously pursue the plaintiffs' cause of

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[15] There is a dispute of fact as to whether Ms. Compton clearly instructed her lawyers she had decided she no longer wished to participate (as she believes) or said that she was thinking it over (as her lawyer believes). That dispute is immaterial, however, as Ms. Compton states clearly that her instructions were given after the relevant time period for Petitioner's Claim. *See* Pet. App. 10a-11a.

[16] The attorney for plaintiffs in *West 514, Inc.* testified he'd been vaguely asked whether settlement should be discussed, but that no offers were made.

[17] Petitioner bases this claim on evidence that the *West 514, Inc.* lawyer sought Respondent University City's help in finding political allies against the proposal and that he verified with University City that he would be reimbursed if he advanced money to hire experts.

action for review of the Board of Commissioners' decision.[18]

5. The State Courts Did Not Find The *West 514, Inc.* Suit "Baseless."

The central factual claim in the Petition for Certiorari is the claim that the state court found the environmental claims "baseless." Pet. 11, 25.

The federal courts below correctly held that the state courts had made no such finding, and that there was no triable issue that the *West 514, Inc.* suit was meritorious. The state courts did *not* rule (though Petitioner asked them to[19]) that the "real issue" motivating the lawsuit was economic competition nor did they call the suit "baseless". The quotations from the state trial court opinion in the Petition are taken out of context.

The three opinions rendered in the state courts were, first, that the *West 514, Inc.* plaintiffs did have standing to challenge the action of the Board of County Commissioners in Superior Court, each having submitted affidavits establishing a threatened injury-in-fact. The state trial court referred to some of their evidence as "compelling" for purposes of standing to pursue environmental review,

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[18] Plaintiffs did not "protract" (Pet. 11) the litigation. The district court found it was undisputed the Cafaro Co. resisted efforts to speed up the case. Pet. App. 15b-17b.

[19] *See*, p. 11 *infra*.

and ordered that a discretionary writ of review issue, overruling Petitioner's objections.[20]

Second, the Superior Court entered a ten page opinion sustaining the Board of Commissioners' approval of the mall project. That opinion did not hold that the petition for review was "baseless." On the contrary the state trial court referred to the "wealth of opinion evidence on both sides of the issues",[21] and held that the Board of Commissioners was entitled to favor the evidence of the project's proponents over that of its opponents. The court said:

> Evidence need not be taken at face value. Part of the job of a trier of fact is to receive evidence and decide what weight, if any, is to be given to each exhibit and to the testimony of each witness. The Board did not, as plaintiffs allege, simply disregard the documents and witnesses plaintiffs presented. As fact-finder, the Board merely placed greater weight on other testimony, other documentary evidence. To do so was not contrary to law.[22]

The state trial court's reference in that opinion to "economic competition" refers not, as Petitioner implies, to some finding of personal ulterior motive, but rather to the specifics of Washington's State Environmental Policy Act (SEPA). Like its federal counterpart, SEPA requires an

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[20] *Appendix* pp. 3, 4.

[21] *Appendix* p. 13.

[22] *Appendix* p. 12. The Court of Appeals' affirmance similarly discussed the conflicting testimony and concluded the Board was entitled to put greater weight on the proponents' evidence. *Appendix* pp. 20-22, 27-28.

environmental impact statement if certain projects will affect the environment. The statute limits the concept of the "environment" to "the 'natural' and 'built' environment",[23] which doesn't cover purely social or economic impacts, except to the extent they affect the "natural" and "built" environment.

The mall opponents had urged the Board of Commissioners to consider (in an environmental study) whether the proposed mall would cause deterioration and blight in downtown Spokane. They produced an expert economist who testified that sales transfer from the downtown cores of other cities to regional malls had led to economic decline and, in turn, physical deterioration and blight in those downtowns. It is against this backdrop that a more complete excerpt of the state trial court's opinion must be considered:

> The Board of County Commissioners concluded that, since SEPA excludes considerations of financial profit or loss resulting from business competition or supply and demand aspects of a particular land use, they could not require that a supplemental EIS be prepared to provide information on the economic or socioeconomic consequences of the shopping center. In fact, the Board did have the benefit of the testimony of Mr. Greg Easton on that issue. His testimony was that the deterioration of a downtown business area may be due to several factors, one of which may be the economic competition of outlying shopping centers.

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[23] Wash. Rev. Code § 43.21C.110(f) (1983).

> WAC 197-11-449 (3) exempts "economic competition" and "profits" issues from the areas to be addressed in environmental impact statements. The legislature has restricted the use of SEPA to "natural" or "built" elements of the environment. RCW 43.21C.110(f). From the materials provided, it is clear that the intent of the legislature was to leave no doubt that concerns such as business competition or potential consumer flight from one commercial center to another was not an environmental consideration under SEPA.
>
> The body of material before the Board pertaining to the issue of economic blight is insufficient to allow any reasonable trier of fact to conclude that such a concern is based on anything more than speculation or conjecture. Moreover a review of that evidence leads the court to the inescapable conclusion that the real issue is just what the rules exclude from environmental consideration: economic competition. The Board's conclusion that a supplemental EIS on economic impact should not be required is not contrary to law.[24]

The Washington State Court of Appeals rejected the lower court's postulate that retail sales transfer is never relevant to show future deterioration and blight. However, it agreed that the mall opponents' proof was not strong enough:

> While loss of retail sales and resulting blight is a possibility, West 514 did not establish the probability or likelihood of this occurring in Spokane.

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[24] *Appendix*, pp. 8-9.

> The Board of County Commissioners was entitled to disregard Mr. Easton's general predictions as not relevant to the circumstances presented [because they were based on the experience of other cities having less viable downtowns than Spokane's]. Thus, we affirm the Board's determination that a supplemental EIS is not required on this issue. In so holding, we recognize that if the *probable* effect of competition is downtown blight such that the built environment is affected, then discussion of that effect in an EIS is called for.[25]

The state courts did not find *West 514, Inc.* baseless. They implicitly rejected Petitioner's arguments that the suit lacked any merit. Petitioner asked the Superior Court to refuse to issue a writ of review, calling the case "an improper attempt by merchants to use environmental laws to prevent competition in the marketplace and protect their vested economic interest." The Superior Court, however, overruled that objection on the strength of the

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[25] *Appendix*, p. 28 (parenthetical added) (emphasis in original). The State Court of Appeals decision is problematic. It means that an opponent must prove, to a high degree of probability, that an adverse environmental effect will flow from a project in order to justify an environmental impact statement, which is itself intended to study possible environmental impacts. Federal law sensibly requires a lower threshold probability to trigger a study of the environmental risk. *LaFlamme v. FERC*, 945 F.2d 1124, 1128 (9th Cir. 1991).

Petitioner offered no rebuttal to the affidavit of Professor Richard Settle, an authority on SEPA and author of *The Washington State Environmental Policy Act: A Legal and Policy Analysis* (Butterworth's Legal Publishers 1991), to the effect that the *West 514, Inc.* case was, in this particular, an unforeseeable, even "aberrational" development in Washington environmental law.

evidence before it and issued the writ of review. Ultimately of course, the court found for Petitioner, but only after an extensive review of the law and evidence led it to conclude the Board of Commissioners had discretion to rule as it had. *Appendix* pp. 5-14.

On appeal to the State Court of Appeals, Petitioner told that court that the *West 514, Inc.* plaintiffs were "major competitors of the project and are raising spurious environmental allegations in order to delay or defeat the project." The State Court of Appeals, too, declined the invitation to brand the appeal as "spurious", but on the contrary ruled for Petitioner only after it had carefully discussed the law and evidence in some detail. *Appendix* pp. 15-29.

Below, Petitioner offered no evidence to rebut the affidavit of Professor Richard Settle, an authority on the Washington State Environmental Policy Act (see note 25, *supra*), that the *West 514, Inc.* case was meritorious:

> Given the magnitude of the proposed Liberty Lake Mall (over 1 million square feet of floor space and parking for 4,550 vehicles), its location overlying the Rathdrum-Spokane aquifer, and the unknown effects of a storm runoff on hazardous leachate from the adjacent Greenacres land fill which had been placed on the EPA "superfund" list, a reasonably prudent person would conclude that the proposed mall crossed the threshold of significance according to all prior relevant court decisions. Under established SEPA case law, I would have predicted that all of the major SEPA arguments

relied upon by the petitioners would have succeeded. The petitioners clearly had a *bona fide* appeal under SEPA as construed by previous Washington case law.

Finally, while it was undisputed that Respondent University City had contributed funds to other groups which had brought environmental challenges to other proposed mall projects, it was also not disputed that those challenges were meritorious and "sincerely and ably" brought and pursued. There was no evidence that any project was prevented on account of any such lawsuit.

V. SUMMARY OF ARGUMENT.

This is not an appropriate case for review on *certiorari*. There are no issues or conflicts of federal law requiring clarification or decision by this Court, and the underlying factual issues were resolved against Petitioner.

VI. ARGUMENT.

A. There Are No Legal Issues Needing Resolution.

Question One in the Petition proposes that this Court decide a question "left open" in *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, ___ U.S. ___, 113 S.Ct. 1920 (1993), whether fraud on a court renders a lawsuit a sham. Pet. at 16. Petitioner's proposal that the Court consider this issue carries the dual implication (1) that there is some conflict or uncertainty in the lower

courts which requires resolution by this Court, and (2) that a resolution favorable to Petitioner will change the outcome in the present case. Neither implication is correct.

First, while this Court chose not to discuss the question in *Professional Real Estate Investors*, it is not an "open question" in the lower courts whether a fraudulent lawsuit is a sham. In the Ninth Circuit's *Professional Real Estate Investors* opinion, reported at 944 F.2d 1525 (9th Cir. 1991), that court held that:

> If a litigant procures a favorable judgment through misrepresentations or other unethical conduct, the success of the lawsuit would not shield the litigant from the antitrust laws.

944 F.2d at 1531 n. 7.

There is no conflict among the circuits which have decided this point.[26]

Petitioner's second implicit proposition, that a favorable decision by this Court on the question posed will change the outcome, is also incorrect. The 9th Circuit adhered in this case to its precedent on fraud and misrepresentation. The court stated (in reference to this Court's opinion in *Professional Real Estate Investors*):

> Read in context with the entire *Professional Real Estate Investors* opinion, footnote 6 does not

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[26] *See, e.g., Opdyke Investment Company v. City of Detroit*, 883 F.2d 1265, 1273 (6th Cir. 1989); *St. Joseph's Hospital v. Hospital Corp. of America*, 795 F.2d 948, 954-55, *reh. denied*, 801 F.2d 404 (4th Cir. 1986); *Hufsmith v. Weaver*, 817 F.2d 455, 459 (8th Cir. 1987).

> obviate application of the Court's two-part test for determining sham litigation *in the absence of proof that a party's knowing fraud upon, or its intentional misrepresentations to the court deprive the litigation of its legitimacy.*
>
> No such scenario is presented in this case.

Pet. App. 10a (emphasis added).

Petitioner thus had the full benefit below of the rule it urges here. Indeed, Respondents have never contended the law is otherwise. Were this Court to affirm, as Petitioner asks, that that is the law, it would affirm the lower court's opinion.

B. The Underlying Factual Claims Were All Resolved Against Petitioner.

Question Two in the Petitioner depends upon assertions of fact on which both lower courts held Petitioner failed to produce any evidence to create a triable issue. This Court has stated that it generally does not sit to review the sufficiency of factual determinations in individual cases, particularly where the opinions of the district court and court of appeals concur on the evidentiary issues. *See General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938). There is no need for such review here.

Respondents moved for summary judgment a year and a half after the case was begun. The motion was not decided for another ten months. During that period, Petitioner simply failed to carry its relatively light burden, as the non-moving party, of producing evidence establishing the existence of triable issues of fact on the key elements

of its case, upon which it bore the burden of going forward. After the district court granted summary judgment, Petitioner was entitled to, and was afforded, *de novo* review in the Court of Appeals. That court correctly applied the legal standard favored by Petitioner (as had the district court, Pet. App. 246-256) that a fraudulent lawsuit would constitute a sham. But the Court of Appeals agreed with the district court, on review of the whole record that:

> No such scenario is presented in this case . . . [Petitioner's] evidence at most goes to [Respondent's] motivation, which we are precluded from examining. *Professional Real Estate Investors*, ___ U.S. ___, 113 S.Ct. at 1928.[27]

There is no need for this Court to conduct a third *de novo* review of the record.

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[27] Pet. App. 10a-11a (parenthetical added).

VII. CONCLUSION.

The four courts (two state courts, and the two federal courts below) have rejected Petitioner's claim that the *West 514, Inc.* suit was "baseless." The Petition for Writ of Certiorari should be denied.

Respectfully submitted this 5th day of July, 1994.

ROBERT B. HENDERSON
HENDERSON AND KALAMON, P.C.
1017 Washington Mutual Building
Spokane, WA 99201
(509) 623-2900

Counsel for Respondents Barnes and McCarthy Management, Inc.

LESLIE R. WEATHERHEAD
WITHERSPOON, KELLEY, DAVENPORT & TOOLE
1100 U.S. Bank Building
Spokane, WA 99201
(509) 624-5265

Counsel for Respondents Magnuson, Plese and University City, Inc.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF SPOKANE

WEST 514, INC., a corporation, et al, Plaintiffs vs. COUNTY OF SPOKANE, a municipal corporation, et al, Defendants	)	No. 87-2-01106-7 MEMORANDUM DECISION

The sole issue presented in this hearing on Plaintiffs' Order to Show Cause is whether plaintiffs have standing to challenge the decision of the Board of County Commissioners. Standing is conferred on "persons aggrieved" by an action of the board. The court must find, (1) the person is likely to suffer a specific, perceived injury in fact, and (2) that the injury falls within the zone of interest of the State Environmental Policy Act.

Case law requires that the "injury in fact" be more than hypothetical or conjectural damages, more than an exercise of the conceivable. Yet common sense decrees proof that the project is *likely* to cause a specific, identifiable injury to plaintiff is sufficient to meet the "injury in fact" requirement. After all, the claim of injury is based upon the occurrence of a future event, the building of the proposed project. Defendants argue for a higher standard of certainty. Under the circumstances, likelihood or probability must suffice.

The "zone of interest" protected or regulated by the State Environmental Policy Act would seem to be limited to "natural" or "built" elements of the environment. Air and water quality, health and quality of life concerns fall within that "zone of interest."

Dr. Esvelt's February 19, 1987 Review (p.2 #8) points out,

> Public drinking water supply wells are immediately downgradient of the Liberty Lake Mall area. The Aquifer transports any pollutants toward these water supplies. Facilities include those of Consolidated Irrigation District, Vera Water and Power, Modern Water Company, Model Electric Water Company, East Spokane Water District, Orchard Avenue Irrigation District, Irving Water District, the City of Millwood and the City of Spokane.

The project in question is located directly over Spokane's sole source aquifer. The site is within the boundaries of what the 208 Aquifer Water Quality Management Plan calls an "Aquifer Sensitive Area." The project proposes to dispose of water that accumulates on its 97 acre facility onto a grassy area at the west end of the project where it will collect, seep into the soil and join the aquifer.

Dr. Esvelt explains that toxic substances from the Greenacres Landfill, .3 mile south of the project site, have already caused a degradation of water quality in the Jeffers Well, just west of the westerly perimeter of the project site:

> It is established that the Aquifer in the vicinity of the Jeffers well is contaminated with toxicants, apparently from leachate originating in the Greenacres Landfill. Transport of these contaminants is probably toward public water supplies. *Discharge of additional stormwaters or other surface waters in this vicinity may increase the rate of transport, or may shift the route to affect public drinking water supplies* . . . The proposed Grass Percolation Areas for stormwater injection from the Mall appear to be in the immediate proximity of the Jeffers well. (February 18, 1987, Review, p. 6, emphasis added.)

Soil and ground water contamination in the area a stone's throw west of the site are well documented. Dr. Esvelt's reports provide compelling evidence that the mall's injection of storm water will flush the already present toxic pollutants faster and further west along the aquifer. It will introduce additional nitrogen, phosphorus compounds, heavy metals such as arsenic, cadmium, chromium, copper, lead, zinc, and nickel to the soil. These pollutants are similar to those present in municipal sewage. Plaintiffs, according to their affidavits, rely upon the aquifer Dr. Esvelt says the mall will contaminate as their sole source of healthy, pure drinking water. So do virtually every other citizen of Spokane and the Spokane valley.

Both Darlene Compton and Mr. and Mrs. Plese drink water from wells within the first-to-be-affected area. If Dr. Esvelt is correct that the mall will speed the migration of contaminants toward their wells, these plaintiffs have demonstrated an injury in fact within the zone of interest of the State Environmental Policy Act. West 512, Inc., who

operate Flaherty's Tavern in downtown Spokane, is several miles down the aquifer. Dr. Esvelt's reports indicate that the proposed project threatens Spokane water.

Plaintiffs have urged the court to consider the negative economic impact on the downtown Spokane which would flow from the proposed mall. WAC 197-11-449 (3) exempts "economic competition" and "profits" issues from the areas to be addressed in *environmental impact statements*. SEPA, however, "contemplates that the general welfare, social, *economic*, and other requirements and essential considerations of state policy will be taken into account in weighing and balancing alternatives." WAC 197-11-448 (1). It is clear that, in addition to information included in environmental impact statements, the economic impact of such a project on Spokane county, the City of Spokane, the downtown business district, can and should be considered by the decision makers. Economics too is within the zone of interest of SEPA. Plaintiffs have demonstrated the likelihood of injury in fact on that issue as well.

Plaintiffs' affidavits, considered with Dr. Larry A. Esvelt's two documents entitled Liberty Lake Mall Environmental Review, persuade the court that plaintiffs have met their burden of proof. They have standing to challenge the Board's action. The Writ of Review shall issue.

DATED this third day of June, 1987.

MICHAEL E. DONOHUE
MICHAEL E. DONOHUE
Superior Court Judge

SUPERIOR COURT OF THE STATE OF WASHINGTON
COUNTY OF SPOKANE

WEST 514, INC., a corporation; ANTONE PLESE and SUNDENE PLESE, husband and wife; and DARLENE COMPTON, Plaintiffs, v. COUNTY OF SPOKANE, a municipal corporation; THE CAFARO CO., a foreign corporation; LIBERTY LAKE INVESTMENTS, INC., a Washington corporation; WELLS B. McCURDY, Trustee; JOHN and JANE DOES 1-50, Trust Beneficiaries to a certain Declaration of Trust dated July 27, 1976, as designated in a Deed of Trust recorded at Volume 753, page 1718 of Official Records of the Offices of the County Auditor for Spokane County, Defendants	NO. 87-2-01106-7 MEMORANDUM DECISION

The governmental bodies responsible for setting environmental policy and for environmental decision-making for unincorporated areas of Spokane County are the Spokane County Planning Department and, ultimately, and Board of County Commissioners. They do so within a framework of federal and state constitutions and statutes, administrative codes, and case law.

The court may not substitute its opinion regarding environmental policy for those of the elected officials charged with that duty. To do so would be a usurpation of the authority of the other branches of government, executive and legislative, and an abuse of the power of the courts.

These limitations on the power of the judicial branch are proper. The executive branch agencies possess environmental expertise the courts do not attain. They are called upon to interpret and carry out the State Environmental Policy Act. They are in the best position to determine the credibility of witnesses. Witnesses actually appeared before those agencies; court review of environmental decisions is based only upon a written record. When the court is asked to review a decision of the Board under SEPA, state law requires that the expertise of the executive branch environmental experts and policy makers be considered.

> In any action involving an attack on a determination by a governmental agency relative to the requirement or absence of the requirement or the adequacy of a 'detailed statement' the decision of the governmental agency shall be afforded substantial weight.

RCW 43.21c.090.

SEPA requires that "An environmental impact statement is required for major actions significantly affecting the quality of the environment." RCW 43.21C.030(2)(c). This requirement that the governmental body be provided a detailed statement of the project's likely effect on the environment is to insure that environmental matters are given proper consideration during decision making.

In 1987 the Spokane County Planning Department considered the Liberty Lake Mall project. Since a 1978 EIS for the Highlands had already been prepared, they elected to adopt a mitigated determination of non-significance (MDNS) rather than to require a new or supplemental EIS. They approved relevant portions of the 1978 EIS, and required the applicant to comply with additional requirements in four areas of concern: (1) traffic circulation, (2) air quality, (3) storm and flood water runoff, and (4) possible flooding in a 100-year flood. Once the applicant submitted proposals addressing those problem areas, and the department concluded that the evaluation of these proposals would be a continuing and ongoing project, the department concluded that the MDNS could be issued with the information available. It was circulated to 22 agencies, and the agency comments were made a condition of project approval.

Defendants allege that the record amply demonstrates that the potential impacts arising from the 1987 project were reasonably evaluated, and that a supplemental EIS was unnecessary. Plaintiffs assert that the Board's failure to consider evidence regarding possible economic blight, and their decision to issue the MDNS before complete traffic circulation or air quality information was available was contrary to law. They further allege the record reveals environmental changes in the 9-years since the 1978 EIS that are not adequately addressed by the MDNS. They argue that these amount to "new information" or "substantial changes" requiring a new or supplemental EIS.

The burden is upon the one attacking a governmental body's finding of "non-significance" that the action is

contrary to law or that the findings are clearly erroneous in view of the entire record as submitted and the public policy contained in SEPA.

WAS THE BOARD's DECISION CONTRARY TO LAW?

The Board of County Commissioners concluded that, since SEPA excludes considerations of financial profit or loss resulting from business competition or supply and demand aspects of a particular land use, they could not require that a supplemental EIS be prepared to provide information on the economic or socioeconomic consequences of the shopping center. In fact, the Board did have the benefit of the testimony of Mr. Greg Easton on that issue. His testimony was that the deterioration of a downtown business area may be due to several factors, one of which may be the economic competition of outlying shopping centers.

WAC 197-11-449 (3) exempts "economic competition" and "profits" issues from the areas to be addressed in environmental impact statements. The legislature has restricted the use of SEPA to "natural" or "built" elements of the environment. RCW 43.21C.110(f). From the materials provided, it is clear that the intent of the legislature was to leave no doubt that concerns such as business competition or potential consumer flight from one commercial center to another was not an environmental consideration under SEPA.

The body of material before the Board pertaining to the issue of economic blight is insufficient to allow any reasonable trier of fact to conclude that such a concern is based on anything more than speculation or conjecture.

Moreover a review of that evidence leads the court to the inescapable conclusion that the real issue is just what the rules exclude from environmental consideration: economic competition. The Board's conclusion that a supplemental EIS on economic impact should not be required is not contrary to law.

The Board approved the issuance of a Mitigated Determination of Non-Significance on this site plan and proposal. Under WAC 197-11-350 setting out the MDNS process,

> The purpose of this section is to allow clarifications or changes to a proposal prior to making the threshold determination.
>
> (1) In making special determinations, an agency may consider mitigating measures that the agency or applicant will implement.

The record reveals that the Board had before it certain air quality, traffic circulation, and storm and flood water impact information, but that they chose to approve the issuance of the MDNS before all air quality studies had been completed, before "208" proposals had been reduced to writing, and before final evaluation of traffic impacts. Among the mitigating conditions required to be done in the future, as set forth in the MDNS, were (1) an air quality monitoring program, (2) a detailed traffic circulation plan, and (3) a drainage plan dealing with storm and flood waters.

Plaintiffs complain that the Board, by relying on incomplete information contained in draft, preliminary, and pending studies, precluded citizen comment and

evaluation. Plaintiffs claim that the Board's action conflicts with WAC 197-11-660(1)(a), which provides that mitigating measures must be based on plans "in effect when the DNS or DEIS is issued."

A review of environmental case law sheds light on the interpretation of that code section. The use of preliminary plans combined with a mitigating requirement that the plans be completed in the future has been approved by the courts in reviewing SEPA and the Washington Administrative Code environmental regulations. *Preliminary* surface drainage plans were part of the MDNS's mitigating measures in *Murden Cove v. Kitsap County,* 41 Wn.App. 515, 704 P.2d 1242 (1985). In another case, the court held that such a procedure was prudent and reasonable.

> While appellants challenge the procedure used by the City Engineer, under the circumstances the procedure appears to us as eminently sensible. Where it is feasible, it appears reasonable to resolve potential environmental problems before formal application is made for a building permit. The pertinent question is whether environmental factors were adequately considered before a final decision was made.

Hayden v. Port Townsend, 93 Wn.2d 870, 613 P.2d 1164 (1980) (reversed on other grounds by *Sane v. Seattle,* 101 Wn.2d 280, 676 P.2d 1006 (1984)). Conditioning a project upon compliance with mitigating measures is a proper act for environmental decision maker to take. WAC 197-11-350; *Brown v. Tacoma,* 30 Wn.2d 762, 637 P.2d 1005 (1981). To require completion of air, traffic, and water

studies as a mitigating condition in an MDNS was not contrary to law.

As part of the procedure leading up to the issuance of the MDNS, the Board adopted portions of the Draft EIS and Final EIS prepared for the 1978 Highlands project. Those portions dealt with impacts of the business park, office park and shopping center which had been planned for the same site. Further, the Planning Department required the applicant to submit an expanded environmental checklist on the 1987 project.

WAC 197-11-600 (3) sets limits on the use of a former EIS for a subsequent project proposal.

> Other agencies acting on the same proposal shall use an environmental document unchanged, except in the following cases:
>
> * * *
>
> (b) for DNSs and EISs, preparation of a new threshold determination or supplemental EIS is required if there are:
>
> (i) Substantial changes to a proposal so that the proposal is likely to have a significant adverse impact . . . or,
>
> (ii) New information indicating a proposal's probable significant adverse environmental impacts. A new threshold determination or SEIS is not required if probable significant adverse environmental impacts are covered by the range of alternatives and impacts analyzed in existing environmental documents.

Regarding (i), above, the Board reviewed the evidence and determined that the 1987 proposal's impact on

the air quality, traffic circulation, and water quality would be less than the impact of the Highlands proposal of 1978.

In *SEAPAC v. Cammack II Orchards*, 49 Wn.App. 609, ___ P.2d ___ (1987), the court considered whether a supplemental EIS was required.

> An action which does not have an environmental impact substantially different from an earlier proposed action does not require either a new threshold determination, or a supplemental draft or final environmental impact statement. In the instant case, the subsequent proposal impacted the environment less than the original expanded application.

As to WAC 197-11-600(3)(ii), above, it is clear that the Board evaluated the information regarding the Greenacres landfill being placed on the superfund list in 1980, the problems with the Jeffers well, and Dr. Esvelt's studies and testimony before reaching its final decision. The Board determined that the Greenacres Landfill site was adequately discussed in the 1978 EIS, and that the concerns raised by the testimony of Dr. Esvelt and Engineer Kennedy do not create "substantial changes" or "new information".

Evidence need not be taken at face value. Part of the job of a trier of fact is to receive evidence and to decide what weight, if any, is to be given to each exhibit and to the testimony of each witness. The Board did not, as plaintiffs allege, simply disregard the documents and witnesses plaintiffs presented. As fact-finder, the Board merely placed greater weight on other testimony, other documentary evidence. To do so was not contrary to law.

WERE THE FINDINGS OF THE BOARD CLEARLY ERRONEOUS?

> A finding is 'clearly erroneous' when, although there is evidence to support, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

Murden Cove v. Kitsap County 41 Wn.App. 515, 523, 704 P.2d 1242 (1985). The court is charged with the duty to examine the environmental documents and determine whether the environmental effects of the proposed action are disclosed, discussed, and substantiated by opinion and data. *Mentor v. Kitsap County,* 22 Wn.App 285, 289, 582 P.2d 1226 (1978). If the court finds that the decision of the Board of County Commissioners approving the department's decision was clearly erroneous, and that it is probable that the proposed action will have more than a moderate effect on the environment, the court can order that an environmental impact statement (EIS) be issued. If the Board action was not clearly erroneous or, more likely than not, the proposed action will have a moderate effect or less on the environment, the court cannot order that an EIS be prepared.

In connection with a review of the entire record, including all exhibits, of the Board of County Commissioners, the court has examined each of the environmental documents as required. It is clear from the record that the environmental effects of the proposed action were disclosed, discussed, and substantiated by opinion and data. There was a wealth of opinion evidence on both sides of the issues. The opinion testimony relied upon by

plaintiffs was couched in terms of possibility. For example, Dr. Esvelt told the Board that the water runoff from the proposed mall "may" or "could" speed migration or change the course of leachates from the Greenacres landfill toward the aquifer. The opinions fall far short of scientific probability or likelihood. When viewed in the context of the entire record, in light of the public policy enunciated in SEPA, those opinions are not persuasive.

The record does not leave the court with a firm conviction that a mistake has been committed. The decision of the Board was not clearly erroneous and must be affirmed.

DATED: March 7, 1988.

/s/ Michael E. Donohue
MICHAEL E. DONOHUE
Judge, Department 9

[No. 9314-0-III. Division Three. April 13, 1989.]

WEST 514, INC., ET AL,
Appellants, v. THE COUNTY OF SPOKANE,
ET AL, *Respondents*.

Nature of Action: Action seeking judicial review of a county's approval of a site development plan for a shopping mall. The county did not require the developer to supplement an environmental impact statement prepared 9 years earlier for a different proposal at the site.

Superior Court: The Superior Court for Spokane County, No. 87-2-01106-7, Michael E. Donohue, J., on April 19, 1988, entered a judgment upholding the county's approval of the plan.

Court of Appeals: Holding that the existing statement was adequate for reviewing the environmental impact of the shopping mall and that the county planning department had sufficiently considered environmental factors before issuing a mitigated determination of nonsignificance, the court *affirms* the judgment.

Randall Gaylord, William Symmes, and *Witherspoon, Kelley, Davenport & Toole,* for appellants.

Donald C. Brockett, Prosecuting Attorney, and *James Emacio, Chief Civil Deputy; Stanley Schultz, Winston & Cashatt, Gerald Neal,* and *Lukins & Annis,* for respondents.

Wells B. McCurdy, pro se.

THOMPSON, C.J. – West 514, Inc., Antone and Sundena Plese, and Darlene Compton[1] (hereafter referred to as West 514) appeal a superior court judgment on writ of certiorari. The judgment affirmed the decision of the Spokane County Board of Commissioners to approve defendant Cafaro Company's site development plan for a proposed retail shopping mall in the Liberty Lake area.[2] In evaluating the effect of the mall on the environment, the Board utilized a 1978 environmental impact statement (EIS) prepared for a different proposal on the same site. The primary issue is whether the Board should have required a supplemental EIS under WAC 197-11-600, promulgated pursuant to RCW 43.21C, the State Environmental Protection Act of 1971 (SEPA). That regulation provides:

> (4) Existing documents may be used for a proposal by employing one or more of the following methods:
>
> . . .
>
> (d) Preparation of a SEIS [supplemental EIS] if there are:
>
> (i) Substantial changes so that the proposal is likely to have significant adverse environmental impacts; or

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[1] West 514, Inc., is a corporation doing business as Flaherty's Restaurant in downtown Spokane. Darlene Compton is a co-owner of the property West 514, Inc., leases for its business. Antone and Sundena Plese are property owners in and residents of Liberty Lake, Washington.

[2] The remaining defendant, Liberty Lake Investments, Inc., holds a deed of trust on the property which is the subject of the proposal.

(ii) New information indicating a proposal's probable significant adverse environmental impacts.

We affirm.

In 1978, the sponsor of a project entitled "The Highlands" obtained a rezone of the subject property for restricted industrial and commercial use. The Highlands proposal involved 800 acres and included plans for a 700-acre residential development, a 29-acre community shopping center with a building area of 128,000 square feet, a 20-acre office park, and an 80-acre business park. In 1981, the sponsor submitted a request for a boundary line adjustment. The commercial zone was increased, but, as a condition to the change, the sponsor was required to submit site development plans for public hearing prior to the issuance of a building permit. For reasons not apparent in the record, the Highlands project was not pursued.

In 1986, Cafaro Company submitted its site development plan for approval. The proposed plan is for a regional shopping center covering 97 acres with a building area in excess of 1 million square feet and parking for 4,550 vehicles. The plans include widening Liberty Lake Road, constructing a new 4-lane road along the southern perimeter of the property, and improving the Harvard Road interchange and the Greenacres interchange to Interstate 90.

On December 23, 1986, the Spokane County Planning Department, in considering the Cafaro site development plan, adopted both the draft EIS and the final EIS prepared in 1978 for the Highlands project and also entered a

mitigated determination of nonsignificance (MDNS). The MDNS stated:

> The lead agency [Spokane County Planning Department] for this proposal has determined that it does not have a probable significant adverse impact on the environment if mitigated as stipulated below. An Environmental Impact Statement (EIS) is *not* required under RCW 43.21C.030(2)(c). This decision was made after review of a completed environmental checklist and other information on file with the lead agency. . . .
>
> There are four areas of concern in the development of the Liberty Lake site. . . .
>
> 1) A background and continued air quality monitoring program. . . .
>
> 2) A detailed traffic and circulation plan. . . .
>
> 3) A drainage plan dealing with '208' design concepts on-site and the off-site drainage disposal for flood waters as identified by the 100-year Flood Hazard Area. . . . ['208' refers to the report of the Spokane County Water Quality Management Program on its investigation of the Spokane-Rathdrum Prairie Aquifer.]
>
> 4) Development in substantial conformance with the submitted site plan except as may be modified by the above studies. . . .

At a public hearing on January 8, 1987, the Spokane County Hearing Examiner concurred with the Planning Department's decision and approved the site development plan.

West 514 appealed this decision to the Spokane County Board of Commissioners which held a de novo hearing on February 19, 1987. At the hearing, West 514 presented the testimony of Dr. Larry Esvelt of Esvelt Environmental Engineering concerning the impact of the proposed mall on water quality. He pointed out that while the 1978 EIS acknowledged that the closed Greenacres Landfill, located immediately southwest of the project, was a "potential aquifer water quality factor", since that time the landfill has been confirmed as a major source of contaminants and placed on the National Priorities List of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (Superfund).

Dr. Esvelt expressed two concerns about the effect of runoff from the mall on water quality. First, "the injection of water at this site is going to increase . . . the water flow in ground water through the area we know is already contaminated by the Greenacres Landfill." Dr. Esvelt was referring to the fact that at least one water source downgradient from the landfill (the Jeffers well) had been identified as containing leachate[3] from the landfill. He testified: "My feeling is that this project could affect . . . methods for cleanup [of the landfill] and we don't know what they're going to be, but it could impact them by spreading the contaminant beyond where they are now . . . "

Second, there are nutrients and toxic metals present in storm water runoff which also pose a threat to the aquifer. The proposal calls for the runoff to be filtered

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[3] Liquid that percolates through soil or other medium.

through a grass percolation area. According to Dr. Esvelt, the efficiency of grass percolation areas has not been documented. He also submitted a written report to the Board in which he stated that "[i]nstallation of stormwater conveyance to another location, such as the Spokane River, should be considered . . . "

In response, Michael Kennedy, consulting engineer to the Cafaro Company, testified that the project met the drainage treatment requirements of Spokane County's Water Quality Management Plan. He stated that any leachate from the landfill would not flow in the direction of the grass percolation area.

West 514 also presented the testimony of Greg Easton, a consulting economist. He reviewed the experience of Tacoma, Everett, Olympia and Seattle and concluded that regional shopping malls had caused a decline in retail sales in the central business districts in those cities. Further, "the loss of retail sales has been accompanied in some instances . . . by, losses of, major office tenants and accompanied in many cases by deterioration of the physical environment". In response to questioning, he admitted Spokane's downtown area was more viable than those of Tacoma, etc. However, he also predicted that the region could not in the near future generate enough retail dollars to support both the new mall and the existing retail shopping sites. Paul Richley of the Cafaro Company countered that the mall would draw shoppers from a wider area and, therefore, the share of the "pie" would not necessarily be reduced.

Witnesses for the Cafaro Company compared other aspects of the current proposal with the 1978 project. Ron

Kirkwood, an engineer and vice-president of development for the Cafaro Company, compared the road systems of the two projects, and stated they were very similar but that Cafaro's proposal was a refinement of the first plan and would eliminate traffic stalling. Another engineer, Glen O'Dell, compared the air quality impacts of the two projects. He testified that presently carbon monoxide levels at the site average 2.5 parts per million cubic feet of air. The 1978 project would have raised that average to 10 to 13 parts per million, but his computer analysis of the impact of the present proposal predicts a level of 7 to 8 parts per million. Federal and state standards call for no more than 9 parts per million.

The Board's findings may be summarized as follows:

1. The Greenacres Landfill was adequately discussed in the 1978 EIS. With respect to Dr. Esvelt's comments that it is difficult to predict what will happen at the landfill as a result of its placement on the federal Superfund toxic waste cleanup list, the Board noted that placement on the list requires responsible parties to take appropriate action in light of surrounding land uses, including the proposal. The Board also cited Engineer Kennedy's testimony that drainage from the landfill will not be affected by the proposed storm water drainage basin for the project.

2. Economic or socioeconomic consequences of a shopping center cannot be the basis for the requirement of an EIS.

3. Allegations of toxic substances in storm water runoff and allegations of the limited success of "208 storm water methods" are not "new information" under

WAC 179-11-600 so as to require a supplemental EIS. The new project is subject to 208 water quality management provisions which requires more stringent standards than the 1978 project.

4. The impacts due to road construction and air quality are less than those predicted in the prior EIS. The condition of approval requiring air quality monitoring and modeling is a mitigating condition which when met will confirm that the project will not have a significant adverse environmental impact.

West 514 appealed the Board's decision, assigning error to the above findings. On April 19, 1988, the Superior Court entered a judgment which affirmed the decision of the Board of Commissioners approving Cafaro's site development plan.

The sole issue is whether the Board's decision is clearly erroneous. *Asarco Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 700, 601 P.2d 501 (1979); *Norway Hill Preserv. & Protec. Ass'n v. King Cy. Coun.*, 87 Wn.2d 267, 275, 552 P.2d 674 (1976). Under this standard, agency action may be reversed when the reviewing court is firmly convinced in light of the record and the public policy contained in

RCW 43.21C.010[4] that a mistake has been committed.[5] *Nisqually Delta Ass'n v. DuPont*, 103 Wn.2d 720, 725-26, 696 P.2d 1222 (1985); *Asarco Inc. v. Air Quality Coalition*,

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[4] RCW 43.21C.101 states:

"The purposes of this chapter are: (1) to declare a state policy which will encourage productive and enjoyable harmony between man and his environment; (2) to promote efforts which will prevent or eliminate damage to the environment and biosphere; (3) and stimulate the health and welfare of man; and (4) to enrich the understanding of the ecological systems and natural resources important to the state and nation."

[5] In applying the standard here, two subissues are presented concerning what constitutes the record. First, West 514 assigns error to that portion of the Superior Court's memorandum opinion in which the judge stated that the testimony of the mall opponents fell short of showing to a scientific probability or likelihood that the proposed project would have more than a moderate environmental impact. It argues that the Superior Court held them to a more onerous standard than that of RCW 43.21C.031, which requires an environmental impact statement for all proposals having a *probable, significant, adverse environmental impact*. The language used by the Superior Court is irrelevant to this court's review. It is clear that this court applies the "clearly erroneous" standard *directly* to the challenged *administrative* decision. *Nisqually Delta Ass'n v. DuPont*, 103 Wn.2d 720, 696 P.2d 1222 (1985). To the extent that West 514's challenge to the "scientific probability" language of the Superior Court also involves a challenge to the Board of Commissioners' finding the proposal had no significant adverse environmental impact, it will be discussed below.

Second, West 514 contends the record should include four documents which Dr. Esvelt referenced in his report to the Board. While the Board received a copy of Dr. Esvelt's report, they did not receive copies of the four documents. Dr. Esvelt's report merely states that it is based upon those four documents. We agree with the Superior Court that the documents were not before the Board of Commissioners, and, thus, cannot be considered.

supra at 700. In such reviews, the court recognizes and defers to the expertise of the administrative agency. *Nisqually;* RCW 43.21C.090.

First, West 514 contends that Dr. Esvelt's testimony about the impact of the mall on water quality constitutes "new information" under WAC 197-11-600 and, therefore, a supplemental EIS is required.

WAC 197-11-600(4)(d)(ii) states a supplemental EIS should be prepared if there is "[n]ew information indicating a proposal's *probable significant* adverse environmental impacts". (Italics ours.) While "probable" is used to distinguish likely impacts from those that are remote or speculative, it "is not meant as a strict statistical probability test". WAC 197-11-782. "Significant" involves context and intensity. "An impact may be significant if its chance of occurrence is not great, but the resulting environmental impact would be severe if it occurred." WAC 197-11-794(2).

In *Barrie v. Kitsap Cy. Boundary Review Bd.*, 97 Wn.2d 232, 235, 643 P.2d 433 (1982), the court noted that passage of time alone is not "significant new information", and the lead agency must determine whether the new information is significant. It quoted the discussion of what is significant contained in *National Indian Youth Coun. v. Andrus*, 501 F. Supp. 649, 663-64 (D.N.M. 1980), *aff'd sub nom. National Indian Youth Coun. v. Watt*, 664 F.2d 220 (10th Cir. 1981):

> Any project . . . will, undoubtedly, generate "information" as it progresses. . . . [I]n order for "new circumstances or information" to attain the status of "significant" these must reach that

> level where, reasonably, it becomes necessary to focus attention once more upon the environmental aspects of a project. . . . An otherwise unguarded reading of this subpart could unleash a procedural plague . . .

Barrie, at 235-36. Further, "every remote and speculative consequence of an action [need not] be included in the EIS." *Cheney v. Mountlake Terrace*, 87 Wn.2d 338, 344, 552 P.2d 184 (1976).

Here, Dr. Esvelt raised concerns about the proximity of the Greenacres Landfill and predicted that runoff from the mall "could" affect methods for cleanup of the landfill. On the other hand, he admitted that runoff from the mall and leachate from the landfill would remain completely separate until reaching the aquifer.

This testimony does not constitute significant new information. The Greenacres Landfill and its potential for contaminating sources of drinking water existed in 1978. In the prior EIS, W.R. Dobratz of the county engineering department commented that "[t]he old landfill area should not be used for subsurface wastewater or storm water disposal . . . because of possible leachate problems". The subsequent identification of contaminants in the Jeffers well and the placement of the landfill on the Superfund cleanup list are developments that could be expected to occur with the passage of time. Finally, Dr. Esvelt's opinion that runoff from the mall "could" affect methods of cleanup of the landfill is too speculative to require a supplemental EIS.

Dr. Esvelt also expressed doubts concerning the effectiveness of grass percolation areas as a means of

disposing of storm water runoff. But again, the 1978 EIS, in the response to comment 13, recognized that runoff water contains contaminants and considered the problem of effectively removing those contaminants. The Highlands project proposed to inject runoff directly into dry wells. Dr. Esvelt did not suggest that the grass percolation areas of the current proposal posed a greater impact.

Accordingly, we affirm the Board's determination that the 1978 EIS was adequate for reviewing the impact of the proposed mall on water quality.

Second, West 514 argues that Mr. Easton's testimony about the effect of regional malls on central business districts is evidence that the proposed mall is a "substantial change" "likely to have significant adverse . . . impacts" on the environment of downtown Spokane. Under WAC 197-11-600(4)(d)(i), such a change, if proven, requires preparation of a supplemental EIS. *See also Save a Neighborhood Env't v. Seattle*, 101 Wn.2d 280, 284, 676 P.2d 1006 (1984); *SEAPC v. Cammack II Orchards*, 49 Wn. App. 609, 613, 744 P.2d 1101 (1987).

Much of Mr. Easton's testimony is general in nature. He gave Olympia, Everett and Tacoma as examples of cities in which central business districts had suffered physical deterioration as the result of competition from regional malls. Yet he conceded that the experience of those cities might not be relevant to Spokane because Spokane has a more viable downtown.

There is no doubt that a large mall in the Liberty Lake area will compete economically with downtown Spokane as well as other area retail centers. But economic competition, in and of itself, is not an environmental

effect and need not be discussed in an EIS. WAC 197-11-448(3). What is missing here is evidence that the proposed mall is likely to have a significant adverse impact on the *physical* environment of downtown Spokane. While loss of retail sales and resulting blight is a possibility, West 514 did not establish the probability or likelihood of this occurring in Spokane. The Board of County Commissioners was entitled to disregard Mr. Easton's general predictions as not relevant to the circumstances presented. Thus, we affirm the Board's determination that a supplemental EIS is not required on this issue. In so holding, we recognize that if the *probable* effect of competition is downtown blight such that the built environment is affected, then discussion of that effect in an EIS is called for. RCW 43.21C.030(2); WAC 197-11-444(2).[6]

Third, West 514 asserts it was error for the Spokane County Planning Department to issue the MDNS. It

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[6] Kenneth S. Weiner, special counsel to the Commission on Environmental Quality, said in his section-by-section analysis of the 1983 amendments to SEPA:

> Traditional areas of concern which would clearly be covered by this section [RCW 43.21C.110(f)] include . . . the problems of blight of downtown and urban areas which would be caused by proposed actions.

Weiner, *Section-By-Section Summary of S.S.B. 3006*, at 195, in R. Settle, *Washington Land Use and Environmental Law and Practice* (1983). *See also* Rodgers, *The Washington Environmental Policy Act*, 60 Wash. L. Rev. 33, 51 (1984) (neither the Legislature nor the WACs eliminate entirely the obligation to consider and discuss socioeconomic effects); Washington State Bar Ass'n, *Major Changes Under the New SEPA Rules-1984*, Second Environmental and Land Use Law Section Mid-Year Meeting and Seminars 3-1, at 3-23 (1984).

described the MDNS as conditioned on future environmental studies which in and of themselves had no mitigating effect. In West 514's view, this procedure allowed the County to make a determination of nonsignificance before the full impact of the mall was understood.

The Washington Administrative Code describes when an MDNS is appropriate:

> The purpose of this section is to allow clarifications or changes to a proposal prior to making the threshold determination.
>
> (1) In making threshold determinations, an agency may consider mitigation measures that the agency or applicant will implement.
>
> . . .
>
> (3) . . . [I]f the lead agency specifies mitigation measures on an applicant's proposal that would allow it to issue a DNS, and the proposal is clarified, changed, or *conditioned* to include those measures, the lead agency shall issue a DNS.

(Italics ours.) WAC 197-11-350. When a governmental agency makes a negative threshold determination, it must show it considered environmental factors "in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA." *Sisley v. San Juan Cy.*, 89 Wn.2d 78, 84, 569 P.2d 712 (1977) (quoting *Juanita Bay Vly. Comm'ty Ass'n v. Kirkland*, 9 Wn. App. 59, 73, 510 P.2d 1140 (1973)).

Here, the MDNS was issued only after the Planning Department adopted the pertinent parts of the 1978 EIS,

reviewed the environmental checklist submitted by Cafaro, and conditioned approval on development in conformance with the site plan "except as may be modified by the . . . studies" specified in the MDNS. In *Murden Cove Preserv. Ass'n v. Kitsap Cy.*, 41 Wn. App. 515, 525, 704 P.2d 1242 (1985), the court upheld approval of a project conditioned on completion of mitigation measures. *See also Hayden v. Port Townsend*, 93 Wn.2d 870, 880-81, 613 P.2d 1164 (1980), *overruled on other grounds in Save a Neighborhood Env't v. Seattle, supra* at 286 n.1. We agree with the Board that the Planning Department adequately considered environmental factors under SEPA before it issued the MDNS.

The Board's action in approving Cafaro's site development plan is affirmed.

GREEN and MUNSON, JJ., concur.

Review denied at 113 Wn.2d 1005 (1989).